

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIARA ROBLES,

Plaintiff,

v.

IN THE NAME OF HUMANITY, WE
REFUSE TO ACCEPT A FASCIST
AMERICA, et al.,
Defendants.

No. C 17-cv-4864-CW

ORDER DENYING LEAVE TO
FILE MOTION FOR
RECONSIDERATION,
REQUEST FOR RECUSAL
AND REQUEST FOR
CERTIFICATION TO NINTH
CIRCUIT

(Docket Nos. 87 & 92)

Plaintiff Kiara Robles seeks leave to file her motion for reconsideration of the Court's order revoking Larry Klayman's pro hac vice status or, in the alternative, seeks recusal of the undersigned pursuant to 28 U.S.C. § 144. Plaintiff subsequently filed a motion for leave to supplement this motion and also seeks certification of these decisions to the U.S. Court of Appeals if the motions are denied here. The Court finds these motions suitable for disposition on the papers. Having reviewed the papers and the record, the Court DENIES Plaintiff's motions.

I. Background

On June 5, 2017, Plaintiff Robles filed her complaint in Robles v. The Regents of the University of California, Berkeley, 17-cv-3235-cw (Robles I). On July 17, 2017, Plaintiff filed a request for recusal in Robles I, arguing that the undersigned is an alumna of University of California Berkeley and was appointed by former president Bill Clinton. Robles I, Docket No. 50. The Court denied the request for recusal on July 25, 2017. Robles I, Docket No. 56 (Recusal Order). On the same day, Plaintiff filed a

1 notice of voluntary dismissal in Robles I. On August 22, 2017,
2 Plaintiff filed the complaint here, alleging nearly identical
3 facts and claims all alleged in Robles I. Docket No. 1. On
4 September 28, 2017, the Court ordered the current case, Robles v.
5 In the Name of Humanity, We Refuse to Accept a Fascist America et
6 al, 17-cv-4864-cw, which had been randomly assigned to another
7 judge, to be related to Robles I.

8 On October 2, 2017, Defendants filed a motion to revoke the
9 pro hac vice status of Plaintiff's counsel, Larry Klayman. Docket
10 No. 15. On May 23, 2018, the Court issued an eleven-page
11 tentative ruling outlining its reasons for its intention to grant
12 Defendants' motion. Docket No. 49 (Tentative Ruling). The Court
13 also offered Mr. Klayman the opportunity to request a hearing
14 before the final ruling. Docket Nos. 49, 56 & 66. In the
15 Tentative Ruling, the Court noted the series of judicial
16 reprimands and sanctions faced by Mr. Klayman, including the Ninth
17 Circuit's affirmance of the District of Nevada's decision to deny
18 Mr. Klayman's application for pro hac vice. Tentative Ruling at
19 2-4. The Court also noted the disciplinary proceedings against
20 Mr. Klayman in the jurisdictions in which he was licensed to
21 practice, Florida and the District of Columbia. The Court relied
22 on the June 19, 2017 District of Columbia Court of Appeals' Board
23 of Professional Responsibility Report and Recommendation (D.C.
24 Recommendation) which "found by 'clear and convincing evidence'
25 that [Mr.] Klayman's conduct 'raises a serious doubt as to his
26 ability to practice in conformance with the rules.'" Id. at 4-6
27 (citing D.C. Recommendation).

1 The Court's Tentative Ruling also addressed Plaintiff's
2 counsel's failure to follow the local rules and procedures of this
3 District, including failing to comply with the Court's deadline to
4 oppose a motion to dismiss. Id. at 10.

5 The parties subsequently submitted supplemental briefing and
6 appeared for a hearing. Docket Nos. 66, 71, 72 & 73. On August
7 31, 2018, the Court issued its final ruling. Docket No. 86 (Final
8 PHV Order). The Court found that Mr. Klayman "present[ed] no new
9 arguments or facts that would change the Court's tentative
10 ruling." Id. at 1. The Court also noted that the D.C.
11 Recommendation was on appeal, but that the "findings that Klayman
12 violated Rules of Professional Responsibility were still
13 instructive." Id.

14 On September 13, 2018, Plaintiff filed the instant request
15 for leave to file a motion for reconsideration of the order
16 revoking Mr. Klayman's pro hac vice status and, in the
17 alternative, again seeking recusal. Docket No. 87. On September
18 14, 2018, the Court issued its order on Defendants' motion to
19 dismiss, dismissing most of Plaintiff's claims against Defendants
20 with prejudice. Docket No. 88. On October 2, 2018, Plaintiff
21 filed her motion for leave to supplement her request for
22 reconsideration, arguing that the Court's order on the motion to
23 dismiss was improper given the pending motion for recusal. Docket
24 No. 92.

II. Discussion

A. Plaintiff's Request for Leave to File Motion for Reconsideration of Order Revoking Pro Hac Vice Status is Denied

This District allows for leave to file a motion for reconsideration if there is a showing of the following:

The moving party must specifically show reasonable diligence in bringing the motion, and one of the following:

(1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or

(2) The emergence of new material facts or a change of law occurring after the time of such order; or

(3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L.R. 7-9.

Plaintiff argues that reconsideration is appropriate here because the Court has "manifest[ly] fail[ed] . . . to consider" three purported "material facts." First, the Court made an incorrect finding that Plaintiff had moved to disqualify the undersigned previously when Plaintiff had only sought a recusal. Motion at 5. Second, the Court "consciously disregarded Robles' constitutional due process" because Plaintiff cannot proceed without Mr. Klayman. Specifically, she cannot find other representation and her local counsel Michael Kolodzi cannot represent Plaintiff by himself. Id. at 6. Third, the Court relied on the D.C. Recommendation as dispositive law and failed to consider the dissenting opinion in a Ninth Circuit case. Id. at

1 7. The Court does not find any of these reasons persuasive. They
2 are insufficient for purposes of reconsideration.

3 First, Robles' argument that the Court made an erroneous
4 finding that she made a motion for disqualification when she only
5 requested recusal is meritless. As the Court noted in the Robles
6 I order denying recusal, "The standards for disqualification or
7 recusal under 28 U.S.C. §§ 144 and 455 are identical." Recusal
8 Order at 1 (citing United States v. Sibla, 624 F.3d 864, 867 (9th
9 Cir. 1980)). Thus, the Court did not make an erroneous finding
10 when it used the term disqualification instead recusal. Nor is
11 this a material fact or dispositive legal argument sufficient for
12 reconsideration purposes.

13 Second, revoking the pro hac vice application of Mr. Klayman
14 has not deprived Plaintiff of any constitutional right to counsel.
15 As the Court has addressed previously in its Final PHV Order,
16 Plaintiff is still represented by Mr. Kolodzi.¹ Furthermore, a
17 plaintiff in a civil case does not have a constitutional right to
18 counsel nor does she have an absolute right to select the counsel
19 she desires. Melendres v. Arpaio, 2015 WL 11071093, at *2 (D. Az.
20 July 10, 2015) (rejecting plaintiff's argument that the court's
21 denial of plaintiff's counsel's pro hac vice application violated
22 his constitutional right to counsel, holding there is no
23 constitutional right to counsel in a civil action); Matter of
24 Wynn, 889 F.2d 644, 646 (5th Cir. 1989) ("[A] litigant must be

25 ¹ If Mr. Kolodzi is unable to continue representing Plaintiff for
26 financial or other reasons, he may seek permission from this Court
27 to withdraw as Plaintiff's attorney pursuant to the local rules.
28 See Civil L.R. 11-5.

1 afforded a fair opportunity to secure counsel of his choice, not
2 that he has an absolute right to select any counsel he desires.");
3 Bass v. Perrin, 170 F.3d 1312, 1320 (11th Cir. 1999); see also
4 United States v. Ries, 100 F.3d 1469, 1471 (9th Cir. 1996)
5 (upholding district court's denial of litigant's counsel's pro hac
6 vice application because there was a "compelling purpose" for the
7 court to "orderly administ[er]" justice). Thus, the Court's
8 revocation of Mr. Klayman's pro hac vice status did not impinge on
9 any constitutional rights.

10 Plaintiff's remaining arguments merely rehash her prior
11 arguments raised in her papers and at the hearing. Plaintiff has
12 not established that the Court "manifestly fail[ed]" to address
13 any of these arguments pursuant to Local Rules. See Final PHV
14 Order at 1-2.

15 Plaintiff has failed to identify any material facts or
16 dispositive legal arguments that the Court had not previously
17 considered. Thus, the Court DENIES Plaintiff's motion for leave
18 to file a motion for reconsideration.

19 B. Plaintiff's Request for Recusal Is Denied

20 Plaintiff also seeks recusal a second time under 28 U.S.C. §
21 144, based again on the alma mater and appointing president of the
22 undersigned. She also complains of the Court's rulings against
23 her. Under § 144, "[w]henever a party . . . makes and files a
24 timely and sufficient affidavit that the judge before whom the
25 matter is pending has a personal bias or prejudice[,]. . . such
26 judge shall proceed no further therein, but another judge shall be
27 assigned to hear such proceeding." 28 U.S.C. § 144. "The
28 affidavit shall state the facts and the reasons for the belief

1 that bias or prejudice exists." Id. This affidavit must be
2 legally sufficient to establish bias or prejudice, and "must state
3 facts which if true fairly support the allegation that bias or
4 prejudice stemming from (1) an extrajudicial source (2) may
5 prevent a fair decision on the merits . . . [and] (3) the
6 substantiality of the support given by these facts to the
7 allegation of bias." United States v. Azhocar, 581 F.2d 735, 739-
8 40 (9th Cir. 1978). Plaintiff's request is denied because she has
9 failed to submit affidavits identifying any purported bias or
10 prejudice and has failed to identify any appropriate basis for
11 recusal. 28 U.S.C. § 144. Plaintiff's affidavits merely state
12 that she cannot find another attorney, and that Mr. Kolodzi will
13 be unable to represent Plaintiff by himself. Docket No. 87-2 &
14 87-3 (Motion, Exs. 2 & 3). These do not speak to any purported
15 bias or prejudice. United States v. Sibla, 624 F.2d 864, 868 (9th
16 Cir. 1980). Plaintiff's request for recusal under § 144 is denied
17 for this reason alone.

18 Nor has Plaintiff identified a valid basis for recusal. She
19 repeats the arguments in her first recusal motion. However, as
20 stated in the Court's order denying Plaintiff's request for
21 recusal in the first instance, Plaintiff's argument is meritless.
22 Recusal Order at 1-2. A judge's alma mater and appointing
23 president do not create the appearance of a conflict of interest.
24 Larson v. C.I.A., No. 1:10-cv-01774 OWW JL, 2010 WL 4623923, at *1
25 (E.D. Cal. Nov. 5, 2010). Plaintiff's only new point -- that the
26 undersigned has demonstrated bias or prejudice based on rulings
27 against Plaintiff -- also fails under clearly established law.
28 Liteky v. United States, 510 U.S. 540, 541 (1994) ("[J]udicial

1 rulings alone almost never constitute [a] valid basis for a bias
2 or partiality recusal motion."); United States v. Studley, 783
3 F.3d 934, 939-40 (9th Cir. 1986) ("[A] judge's prior adverse
4 ruling is not a sufficient cause for recusal" and is not an
5 extrajudicial source). Plaintiff's request for recusal is DENIED.

6 C. The Court Did Not Improperly Issue an Order While
7 Plaintiff's Motion for Reconsideration was Pending

8 Plaintiff argues in her supplemental motion that the Court
9 improperly issued an order on Defendants' motion to dismiss when
10 her recusal motion was pending. Supp. Motion at 4-5. When a
11 party files a timely and sufficient affidavit of bias or prejudice
12 on the part of the judge before whom the party's case is pending,
13 it is upon the judge to pass on the affidavit's legal sufficiency.
14 28 U.S.C. § 144; Berger v. United States, 255 U.S. 22, 35-36
15 (1922). "Only after the judge determines that the affidavit of
16 bias or prejudice is legally sufficient does it become the duty of
17 the judge to 'proceed no further' in the case." Azhocar, 581 F.2d
18 at 738. As stated above, Plaintiff's affidavits were not legally
19 sufficient. Thus, a stay of the current proceedings was not
20 warranted, nor would it have been appropriate to assign the case
21 to another a judge. Issuing an order while the current recusal
22 motion was pending was not improper.

23 D. Plaintiff Is Not Entitled to Interlocutory Appeal

24 Plaintiff lastly seeks permission to certify for
25 interlocutory appeal under 28 U.S.C. § 1292(b) any order denying
26 recusal and the order revoking Mr. Klayman's pro hac vice status
27 if reconsideration is denied in this Order. Supp. Motion at 6-8.
28 Pursuant to 28 U.S.C. § 1292(b), the district court may certify an

1 appeal of an interlocutory order if (1) the order involves a
2 controlling question of law, (2) appealing the order may
3 materially advance the ultimate termination of the litigation and
4 (3) there is substantial ground for difference of opinion as to
5 the question of law. See Reese v. BP Exploration (Alaska) Inc.,
6 643 F.3d 681, 687-88 (9th Cir. 2011). "Section 1292(b) is a
7 departure from the normal rule that only final judgments are
8 appealable and therefore must be construed narrowly." James v.
9 Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002).
10 Thus, the court should apply the statute's requirements strictly,
11 and should grant a motion for certification only when exceptional
12 circumstances warrant it. Coopers & Lybrand v. Livesay, 437 U.S.
13 463, 475 (1978), superseded on unrelated grounds in Microsoft
14 Corp. v. Baker, 437 U.S. 463 (2017). The party seeking
15 certification to appeal an interlocutory order has the burden of
16 establishing the existence of such exceptional circumstances. Id.
17 A court has substantial discretion in deciding whether to grant a
18 party's motion for certification. Brown v. Oneonta, 916 F. Supp.
19 176, 180 (N.D.N.Y. 1996).

20 Here, Plaintiff again merely repeats her arguments asserted
21 in her motions for reconsideration and for recusal. Supp. Motion
22 at 6-11. Plaintiff only offers a formulaic recitation of the
23 standard for interlocutory appeal. She does not identify a
24 controlling question of law, establish how granting certification
25 would materially advance the termination of the litigation, or
26 point to a substantial difference of opinion. Plaintiff has not
27 met her burden to show exceptional circumstances that would merit
28 interlocutory appeal on either issue. Zepeda v. PayPal, Inc.,

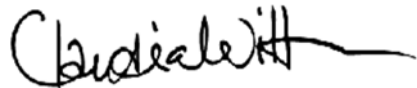
1 C10-2500 SBA, 2014 WL 588066, at *2 (N.D. Cal. Feb. 14, 2014)
2 (finding plaintiff's motion to be frivolous and filed in bad faith
3 and denying plaintiff's request for interlocutory appeal of
4 plaintiff's § 144 recusal motion); Brooks v. Motsenbocker Advanced
5 Devs., Inc., 07-cv-0773-MMA, 2009 WL 10671993, at *4 (S.D. Cal. May
6 15, 2009) (denying interlocutory appeal of an attorney
7 disqualification order).

8 III. Conclusion

9 For the foregoing reasons, Plaintiff's motion for
10 reconsideration and, in the alternative, for recusal is DENIED.
11 Plaintiff's supplemental motion seeking interlocutory appeal of
12 these two decisions is also DENIED.

13 IT IS SO ORDERED.

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15 Dated: October 24, 2018



16 CLAUDIA WILKEN
17 United States District Judge
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